

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
	)	
Improving Public Safety	)	WT Docket No. 02-55
Communications in the 800 MHz Band	)	
	)	
New 800 MHz Band Plan for the	)	
U.S. Virgin Islands	)	
	)	

**COMMENTS OF SMARTCOMM, L.L.C.**

Smartcomm L.L.C. (“Smartcomm”), through its counsel, Kenneth Fry, and Preferred Spectrum Investments, LLC (“PSI”) hereby respectfully submit these brief comments in response to the *Third Further Notice of Proposed Rulemaking* (“*Third FNPRM*”) in the above captioned matter, where the Commission’s Public Safety and Homeland Security Bureau (“Bureau”) invites input on the 800 MHz Transition Administrator’s proposal to apply the Puerto Rico band plan it recently adopted to the United States Virgin Islands.<sup>1</sup>

The TA’s band plan for Puerto Rico is flawed and its application to the Virgin Islands would be flawed for similar reasons. The Bureau should reject the TA’s proposal for the reasons noted in the Petition for Reconsideration of the *Third Report and Order* we filed today.<sup>2</sup> To summarize these reasons, when the Commission singled out Puerto Rico and the Virgin Islands

---

<sup>1</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Third Report and Order and Third Further Notice of Proposed Rulemaking*, DA 10-695 (rel. April 26, 2010) (“*Third FNPRM*”).

<sup>2</sup> Petition for Reconsideration of the *Third Report and Order* of Smartcomm L.L.C., Mr. Kenneth Fry, and Preferred Spectrum Investments, LLC, WT Docket No. 02-55 (filed July 22, 2010). The Petition for Reconsideration is incorporated herein by reference and is attached to these comments.

for different treatment from the rest of the nation, it presumably did not intend for the Bureau merely to reapply, without significant adjustment, the national rebanding plan with a small 0.5 MHz adjustment to the guard band. In trying to force Puerto Rico and the Virgin Islands into the national mold, the Bureau submits these areas to treatment unaccountably different from that of the SouthernLINC region, and places Enhanced Specialized Mobile Radio licensees and eligibles in a worse position than is necessary or appropriate, encumbered needlessly by Sprint's site licenses. Further, the *Third Report and Order* contemplates the possibility of supplying Sprint with spectrum for which it has neither applied nor paid. For these reasons the Commission should not extend this plan to the Virgin Islands.

Respectfully submitted,

\_\_\_\_\_  
/s/

**Smartcomm, L.L.C.**  
3131 E. Camelback Rd.  
Suite 450  
Phoenix, AZ 85016  
(602) 224-1080

**Mr. Kenneth Fry**  
36 Jared Blvd.  
P.O. Box 5244  
Kendall Park, NJ 08824

**Preferred Spectrum Investments, LLC**  
3131 E. Camelback Road  
Phoenix, AZ 85016  
(602) 808-1030

Pantelis Michalopoulos  
Christopher R. Bjornson  
Andrew Guhr  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 429-3000  
*Counsel for Smartcomm L.L.C.*

July 22, 2010

**Attachment A**

**PETITION FOR RECONSIDERATION OF THE *THIRD  
REPORT AND ORDER* OF SMARTCOMM, L.L.C.,  
KENNETH FRY, AND PREFERRED SPECTRUM  
INVESTMENTS, LLC, WT DOCKET NO. 02-55**

	)	
In the Matter of	)	
	)	
Improving Public Safety	)	WT Docket No. 02-55
Communications in the 800 MHz Band	)	
	)	
New 800 MHz Band Plan for Puerto Rico	)	
and the U.S. Virgin Islands	)	
	)	

**PETITION FOR RECONSIDERATION OF THE *THIRD REPORT AND ORDER* OF  
SMARTCOMM, L.L.C., KENNETH FRY, AND PREFERRED SPECTRUM  
INVESTMENTS, LLC**

July 22, 2010

## TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY .....	1
II.	BACKGROUND .....	3
III.	STATEMENT OF INTEREST .....	5
IV.	PUERTO RICO SHOULD BE TREATED COMPARABLY WITH THE SOUTHERNLINC REGION.....	6
V.	THE <i>THIRD REPORT AND ORDER</i> IMPROPERLY ENCUMBERS NON- SPRINT ESMR LICENSEES AND ESMR ELIGIBLES .....	8
VI.	THE PROPOSED REASSIGNMENT OF CHANNELS IN PUERTO RICO REPRESENTS AN INAPPROPRIATE WINDFALL TO SPRINT .....	12
VII.	THE BUREAU MAY HAVE EXCEEDED ITS DELEGATED AUTHORITY .....	13
VIII.	CONCLUSION.....	15

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	
Improving Public Safety	)	WT Docket No. 02-55
Communications in the 800 MHz Band	)	
	)	
New 800 MHz Band Plan for Puerto Rico	)	
and the U.S. Virgin Islands	)	
	)	

To: The Commission:

**PETITION FOR RECONSIDERATION OF THE *THIRD REPORT AND ORDER* OF  
SMARTCOMM, L.L.C., KENNETH FRY, AND PREFERRED SPECTRUM  
INVESTMENTS, LLC**

**I. INTRODUCTION AND SUMMARY**

Smartcomm L.L.C. (“Smartcomm”), through its counsel, Kenneth Fry, and Preferred Spectrum Investments, LLC (“PSI”) hereby petition for reconsideration of the *Third Report and Order* in the above captioned matter, where the Commission’s Public Safety and Homeland Security Bureau (“Bureau”) adopted a revised 800 MHz band plan for Puerto Rico.<sup>1</sup> That decision should be reconsidered and amended for four reasons.

*First*, without any explanation, the Bureau has decided to treat Puerto Rico differently than another area of the U.S. that by the Commission’s own recognition shares with Puerto Rico key common characteristics – characteristics that in turn differentiate the two areas from the rest of the nation. This is the so-called SouthernLINC Wireless (“SouthernLINC”) area, which

---

<sup>1</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Third Report and Order*, DA 10-695 (rel. April 26, 2010) (“*Third Report and Order*”).

extends to a number of counties in Georgia, Alabama, Mississippi, and Florida.<sup>2</sup> What the Commission did on account of these characteristics in the SouthernLINC area was simple and reasonable – it extended the Enhanced Specialized Mobile Radio (“ESMR”) band by 7 MHz from 817-824 MHz/862-869 MHz to 813.5-824 MHz/858.5-869 MHz.<sup>3</sup> But in Puerto Rico the Commission did not expand the ESMR band at all, settling on the “Procrustean” method of reducing the channel assignments of ESMR licenses and “eligibles” in order to make these assignments fit in the unaugmented ESMR spectrum, without providing an adequate, or indeed any, explanation for such disparate treatment.

*Second*, the *Third Report and Order* inappropriately allows Sprint’s site-specific 800 MHz licenses to encumber the non-Sprint ESMR licensees and ESMR eligibles in Puerto Rico. This encumbrance, compounded with Sprint’s acquisition of additional site licenses, places non-Sprint licensees in a competitively worse position than they previously occupied because they are now subject to the operations of a competitor. It also is inconsistent with at least the spirit of the Commission’s directive that Sprint licenses be surrendered to the extent necessary to make non-Sprint licensees whole.<sup>4</sup> In its instructions to the Transition Administrator (“TA”), the Commission commanded that “Sprint is to be assigned replacement spectrum on the same basis as other EMSR licensees.”<sup>5</sup> Yet Sprint’s 800 MHz licenses in Puerto Rico will not be similarly encumbered by any site-specific licensee. The TA should not permit Sprint site licenses to

---

<sup>2</sup> Improving Public Safety Communications in the 800 MHz Band, *First Report and Order*, 19 FCC Rcd. 14969, Appendix G (2004) (“*First Report and Order*”).

<sup>3</sup> *Id.* ¶ 166.

<sup>4</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Second Memorandum Opinion and Order*, FCC 07-102, ¶ 33 (rel. May 30, 2007) (“*Second Memorandum Opinion and Order*”).

<sup>5</sup> *Id.*

operate in or limit others' EA spectrum. At a minimum, the Commission must clarify that ESMR channels received by non-Sprint licensees or eligibles will not be encumbered in any manner by Sprint's site licenses.

*Third*, the *Third Report and Order* decrees that "if [Preferred Communications Systems, Inc.'s ("PCSI's")] and [Preferred Acquisitions, Inc.'s ("PAI's")] licenses are revoked or canceled, their reserved channels will be redistributed so that North Sight would hold 120 channels (no change) and Sprint would hold 160 channels (a five channel reduction),"<sup>6</sup> thus assigning the available spectrum automatically to Sprint. There is no basis for according such a preference to Sprint, and no explanation as to why this preference is necessary or appropriate. Sprint has already received the benefit of the bargain it struck in 2004 through the grant of its nationwide 1.9 GHz license.<sup>7</sup> It would be an unjustified windfall for Sprint now to suffer a mere five channel (three percent) reduction in its Economic Area ("EA") ESMR channels when the total ESMR spectrum is being reduced by 130 channels (more than 30 percent). Instead, if the PCSI licenses are revoked, their channels should be treated as vacant channels and made available for licensing by general applicants in the I/B Radio Pool.

Finally, the Bureau's action seems to go beyond the scope of its delegated authority as the decision appears to transcend the Commission's limiting guidance and to act in areas not properly delegated.

## **II. BACKGROUND**

To alleviate interference problems for critical public safety communications, the Commission adopted the *First Report and Order* in this proceeding in 2004. That decision

---

<sup>6</sup> *Third Report and Order* ¶ 14.

<sup>7</sup> *First Report and Order* ¶¶ 12, 33-35, 223-25.



ordered the reconfiguration of the entire 800 MHz band based on a plan developed by Nextel (now Sprint),<sup>8</sup> then and now the largest ESMR licensee across most of the nation. Sprint received a nationwide license of 10 MHz in the 1.9 GHz band, and clean, contiguous, and unencumbered spectrum in the 800 MHz for its ESMR licenses. For its part, Sprint undertook certain obligations to allow the reconfiguration of the 800 MHz band. Sprint's new license was valued at \$4.86 billion, and Sprint agreed to pay the U.S. Treasury that amount minus the value of the spectrum it gave up and the costs incurred in the reconfiguration (to date, Sprint has paid \$850 million).<sup>9</sup>

But in that same 2004 decision, the Commission recognized some limits to Sprint's plan. The reconfiguring of the 800 MHz band was possible because Sprint itself was the largest holder of ESMR licenses in most areas of the country. An exception is in the region where SouthernLINC holds many ESMR licenses. In these areas, it was SouthernLINC, not Sprint, that held the majority of the spectrum – prompting the Commission to accept a unique plan, based on an agreement between Sprint and SouthernLINC, to expand the available spectrum by 7 MHz and protect the holdings of both licensees.<sup>10</sup>

In May 2007, the Commission's *Second Memorandum Opinion and Order* recognized that two other areas were unique: Puerto Rico and the Virgin Islands.<sup>11</sup> In those two regions, it was not just one, but two non-Sprint licensees that held significant amounts of 800 MHz ESMR channels, along with a large number of site-based ESMR licenses.<sup>12</sup> Thus, the *Second*

---

<sup>8</sup> *First Report and Order* ¶ 2.

<sup>9</sup> *Id.* ¶¶ 29, 34, 297.

<sup>10</sup> *Id.* ¶¶ 164-67.

<sup>11</sup> *Second Memorandum Opinion and Order* ¶ 12.

<sup>12</sup> *Id.*

*Memorandum Opinion and Order* directed the TA to craft, and submit to the Commission for its approval, a plan that accommodated ESMR licensees in the new ESMR spectrum.<sup>13</sup>

In October 2007, the TA presented its proposed 800 MHz band plan for Puerto Rico, essentially conforming Puerto Rico to the rest of the United States.<sup>14</sup> In contrast with the expanded ESMR band for the SouthernLINC region, the spectrum assigned to ESMR licensees in Puerto Rico would essentially be subject to the same boundaries applicable to parts of the nation that did not raise the same problems. In 2010, the Public Safety and Homeland Security Bureau (“Bureau”) essentially approved the TA’s proposal in the *Third Report and Order*.

### **III. STATEMENT OF INTEREST**

Smartcomm is an entity interested in applying for commercial radio licenses and advising licensees in the 800 MHz Expansion Band and Guard Band.<sup>15</sup> As a potential licensee, Smartcomm has an interest in avoiding interference and in competing with Sprint in the CMRS markets, including Puerto Rico – interests that give it standing to participate in this proceeding as interference and competition-related considerations are the paradigmatic bases of standing under the Communications Act.<sup>16</sup> In addition, Smartcomm’s President, Carole Downs, is the Secretary of PSI, whose interest in the proceeding is described below. Furthermore, Smartcomm’s Vice

---

<sup>13</sup> *Id.* ¶ 33.

<sup>14</sup> Proposal for Adoption of an Alternative 800 MHz Band Plan and Negotiation Timetable for the Puerto Rico and U.S. Virgin Islands Economic Area, WT Docket 02-55 (filed Oct. 19, 2007); *Third Report and Order* ¶¶ 5, 8.

<sup>15</sup> Smartcomm was founded in 2007 with Ms. Carole Downs serving as President and Mr. Pendleton Waugh as Vice President.

<sup>16</sup> See *FCC v. Sanders Brothers*, 309 U.S. 470, 477 (1940) (finding that Congress wanted a competitor or potential competitor to have standing because such a competitor “would be the only person to have a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission”); *FCC v. National Broadcasting Company*, 319 U.S. 239, 247 (1943) (holding that a party has standing to intervene when an FCC “action would cause electrical interference” to its operations).

President, Mr. Pendleton Waugh, is, as the *Third Report and Order* notes, a “related party” in the Commission’s proceedings related to PCSI’s and PAI’s licenses.<sup>17</sup> For these reasons, Smartcomm has standing to file this reconsideration petition as an interested entity under Section 1.429 of the Commission’s Rules.<sup>18</sup>

Kenneth Fry is the former holder of a GX conventional SMR license with the call sign WPDU206, which was transferred to PCSI pursuant to a License Purchase Agreement dated January 31, 1999. Mr. Fry has intervened as a party asserting rights related to that license on behalf of himself and 86 other individuals who held rights to similar licenses and who transferred their respective licenses to PCSI, in litigation pending in the Delaware Court of Chancery to act for and bind PCSI. As a result, Mr. Fry has standing to file this reconsideration petition as interested persons under Section 1.429 of the Commission’s Rules.

Preferred Spectrum Investments, LLC (“PSI”) was formed in February 2009 by 17 investors in PCSI. Mike Judy, PSI’s president, is also the named plaintiff to the litigation pending before the Delaware Court of Chancery asserting rights related to the ownership of PCSI and therefore to PCSI’s licenses, and PSI supports him in those efforts. Therefore, PSI has standing to file this reconsideration petition as interested persons under Section 1.429 of the Commission’s Rules.

#### **IV. PUERTO RICO SHOULD BE TREATED COMPARABLY WITH THE SOUTHERNLINC REGION**

The very characteristic that unites Puerto Rico and the SouthernLINC territory and differentiates these two areas from the rest of the country is, of course, the fact that the ESMR

---

<sup>17</sup> *Third Report and Order* ¶ 9. For purposes of full disclosure, Smartcomm notes that the Commission has raised certain character-related questions regarding the qualifications of Mr. Waugh, questions that Mr. Waugh is anxious to answer at the appropriate time.

<sup>18</sup> 47 C.F.R. § 1.429.

spectrum is inadequate in both regions to accommodate both Sprint and all non-Sprint ESMR licensees. This shortage, in turn, is due to the fact that in these two areas there are other large ESMR licensees – SouthernLINC in its territory, and the North Sight and PCSI entities in Puerto Rico. This leaves Sprint with an insufficient amount of spectrum to surrender, in contrast with almost all of the remaining U.S. regions of the United States outside the Gulf of Mexico.<sup>19</sup>

Here is how the Commission described the unique nature of the 800 MHz licenses in the SouthernLINC territory:

We are aware that, in some markets, there may be insufficient spectrum in the 816-824 MHz/861-869 band segment to accommodate both incumbent ESMR licensees already operating there and new ESMR entrants migrating from the lower channels. This is particularly true of certain markets in which both Southern LINC and Nextel currently are offering service. In those markets, Southern LINC holds a large number of licenses in the interleaved portion of the band, and also holds licenses for some General Category channels. Consequently, there are an inadequate number of channels in the 816-824 MHz/861-869 MHz band segment to replicate the existing channel capacity of both Southern LINC and Nextel.<sup>20</sup>

The Commission described the uniqueness of Puerto Rico in very similar terms:

We agree with petitioners that the nature of incumbency in the Puerto Rico market presents a unique situation that is distinct from other markets. Sprint holds considerably less spectrum in Puerto Rico than it does elsewhere, and there are several other licensees that have acquired significant EA license holdings in Puerto Rico at auction and seek to operate as ESMRs. In addition, Puerto Rico has numerous site-based incumbents (including C&I, other non-public safety licensees, and some public safety licensees) that will need to be relocated to the non-ESMR block. Thus, it appears that an alternative band plan is appropriate here.<sup>21</sup>

If anything, the band plan in Puerto Rico is even more cluttered and cumbersome than was the case in the SouthernLINC region, for at least two reasons. First, three companies –

---

<sup>19</sup> See *Second Memorandum Opinion and Order* ¶ 38. Since Sprint has no licenses in all of the Gulf of Mexico, and no public safety licensees operate there, the Commission decided against any rebanding in that region. *Id.*

<sup>20</sup> *First Report and Order* ¶ 164. The “distribution of cellular-architecture and non-cellular systems” in some areas was “atypical.” *Id.* ¶ 166.

<sup>21</sup> *Second Memorandum Opinion and Order* ¶ 32.

Sprint, North Sight, and PCSI – own over 120 EA channels each, with none owning more than 165 of the channels available.<sup>22</sup> In the SouthernLINC region, by contrast, there were only two main license holders. Second, the number of site-based, non-ESMR incumbents appears to be higher in Puerto Rico than even in the SouthernLINC territory.<sup>23</sup>

The problem was thus the same, but the solutions differ sharply and unaccountably. In the SouthernLINC region, because insufficient channels were available in the ESMR band to relocate the incumbents on a 1:1 basis, the Commission opted to expand the ESMR spectrum by 7 MHz to accommodate both incumbents.<sup>24</sup> Yet, in Puerto Rico, where the spectrum shortage is if anything even more acute, the Bureau did not expand the ESMR band at all. The Bureau failed to articulate a reason why these two regions, so similarly situated, should be disparately treated. Its decision, therefore, falls short of the reasoned decisionmaking required under the Administrative Procedure Act. The Bureau is not free to treat such similarly situated parties so differently unless there is adequate justification for such treatment.<sup>25</sup>

## **V. THE THIRD REPORT AND ORDER IMPROPERLY ENCUMBERS NON-SPRINT ESMR LICENSEES AND ESMR ELIGIBLES**

The measures adopted in this proceeding are intended, not only to prevent the Commission from overpaying for rebanding, but also to make and keep non-Sprint licensees

---

<sup>22</sup> *Id.* ¶ 32 n.73.

<sup>23</sup> *Id.* ¶ 32.

<sup>24</sup> *First Report and Order* ¶ 164. Attached as Exhibit A is a chart detailing the 800 MHz band plan for most of the United States; in the SouthernLINC region; and in Puerto Rico – both as the TA and Bureau have proposed and a band plan as optimized for all the ESMR licensees.

<sup>25</sup> *Garrett v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (An agency “cannot act arbitrarily nor can it treat similar situations in dissimilar ways.”). *See also Fresno Mobile Radio, Inc. v. FCC*, 165 F. 3d 965, 972 (D.C. Cir. 1999) (“Commission failed reasonably to explain its decision to apply different build out requirements to EA licensees and to incumbent wide-area SMR licensees, such as Southern, which provide substantially similar services. Accordingly, the Interim Coverage Requirement for EA licensees must be remanded to the agency...”).

whole. In the *Second Memorandum Opinion and Order*, the Commission directed that “Sprint must surrender spectrum on a *pro rata* basis to the other licensees to meet the shortfall.”<sup>26</sup> The Commission continued: “If insufficient spectrum remains after Sprint has surrendered spectrum, *pro rata* apportionment may be used to determine each licensee’s share of the ESMR band.”<sup>27</sup> In the *Third Report and Order*, the Bureau similarly directs the TA:

If, however, sufficient ESMR channels are not available to assign them on a 1:1 basis to all non-Sprint ESMR and ESMR-eligible licensees electing to relocate to the ESMR band, then the number of Sprint ESMR channels will be reduced to the extent necessary to assign channels to the non-Sprint licensees on a 1:1 basis.<sup>28</sup>

The Bureau appears to conclude that the Commission directive has been fulfilled without impairment to non-Sprint licensees. It specifically has calculated that the post-rebanding distribution of ESMR EA channels would result in PCSI and PAI holding 125 channels (no change), North Sight holding 120 channels (no change) and Sprint holding 35 channels (a reduction of 130 channels).<sup>29</sup>

This analysis, however, is silent as to a significant burden that would appear to fall on non-Sprint EA channels: channels licensed to Sprint on a site-specific basis. Under the Commission’s Rules, 47 C.F.R. § 90.683, non-Sprint licensees will be required to limit their

---

<sup>26</sup> *Second Memorandum Opinion and Order* ¶ 33.

<sup>27</sup> *Id.*

<sup>28</sup> *Third Report and Order* ¶ 13.

<sup>29</sup> *Id.* ¶ 14 (PCSI and PAI hold 131 total EA-licensed and site-licensed paired channels covering the western half of Puerto Rico and 144 total EA-licensed and site-licensed paired channels covering the eastern half of the island. North Sight holds 120 total EA-licensed and site-licensed paired channels covering the western half of Puerto Rico and 130 total EA-licensed and site-licensed paired channels covering the eastern half of the island. In addition, Trunked Systems Puerto Rico, Inc. holds 14 paired channels on the eastern half of the island.).

operations and coordinate with the site-based operations of their own competitor.<sup>30</sup> By contrast, Sprint's EA channels would not be subject to a similar burden.

Under the national rebanding plan, Sprint is essentially voluntarily surrendering its 800 MHz noncontiguous, EA- and site-licensed channels within the Interleaved, Expansion, and Guard Band channels in exchange for obtaining clean, contiguous, and unencumbered 800 MHz ESMR licenses and a nationwide 1.9 GHz license, and further in exchange for its promise, secured by a Standby Letter of Credit, to pay all of the directly related and reasonable costs of reconfiguring the 800 MHz Band.<sup>31</sup> To that end, Sprint has been entering into Frequency Reconfiguration Agreements ("FRAs") that relocate 800 MHz licensees currently in the 817-824 MHz/862-869 MHz band to a new frequency band so that Sprint can then transition its own ESMR operations into that band.<sup>32</sup> Under that scheme, non-Sprint site-specific licensees have thus been evacuating the new ESMR band.<sup>33</sup>

Sprint has held on to its own ESMR site-specific licenses and transitioned them to the ESMR band. Pursuant to the *Supplemental Order*, non-Sprint, site-based ESMR licenses can transfer to the ESMR band if three conditions were met: (1) the licensee also holds an EA license in the same market; (2) the site-based facility was being used as part of a cellular-architecture system as of the date of the *First Report and Order*; and (3) the site-based facility must have been an operational part of the licensee's ESMR system in that EA.<sup>34</sup> Sprint was able to meet

---

<sup>30</sup> 47 C.F.R. § 90.683(a).

<sup>31</sup> *First Report and Order* ¶¶ 6, 11, 23, 146-58.

<sup>32</sup> *Id.* ¶ 261.

<sup>33</sup> *Id.* ¶ 162.

<sup>34</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Supplemental Order and Order on Reconsideration*, FCC 04-294 ¶ 78 (rel. Dec. 22, 2004) ("*Supplemental Order*").

this condition for its licenses.<sup>35</sup> Because of the nature of the industry at the time, most site-based ESMR licensees other than Sprint, including PCSI, could not meet this requirement. In effect, therefore, Sprint would acquire unencumbered spectrum, while leaving non-Sprint ESMR licensees' spectrum encumbered by the Sprint grandfathered site licenses, pursuant to Section 90.683 of the Commission's Rules.<sup>36</sup>

This problem is mitigated somewhat in most of the United States by the disproportionate share of the ESMR channels held by Sprint – there are not many non-Sprint EA channels *to* encumber. In the SouthernLINC region, the problem is mitigated by the agreement between SouthernLINC and Sprint as well as the Commission's expansion of the ESMR band by 7 MHz.

But in Puerto Rico, where non-Sprint licensees hold the vast majority of EA licenses, the outcome is dramatically worse, and the *Third Report and Order* does nothing to mitigate the harm. There is not enough clean, contiguous, and unencumbered spectrum for the other ESMR licenses to be reconfigured. And while Sprint also has site-based licenses in others' EA channels,<sup>37</sup> only Sprint is assured of EA spectrum that is unencumbered by site licenses operated by competitors.<sup>38</sup> These burdens are aggravated further because, under rebanding, Sprint has been acquiring an ever increasing number of 800 MHz site-specific licenses in Puerto Rico.<sup>39</sup>

---

<sup>35</sup> Sprint and SouthernLINC were not held to these conditions in the SouthernLINC region pursuant to the agreement between them. *Id.* ¶ 82.

<sup>36</sup> See 47 C.F.R. § 90.683(a).

<sup>37</sup> *Supplemental Order* ¶ 79 (grandfathering ESMR licensees in operation before November 22, 2004 to also hold site-specific channels in the ESMR band).

<sup>38</sup> See 47 C.F.R. § 90.683(a).

<sup>39</sup> See, e.g., Nextel License Holdings 5, ULS File No. 0003772112 (granted Mar. 21, 2009) (agreeing to the assignment of Crown Castle's 47 site-based licenses in Puerto Rico to Sprint). Sprint has been to avail itself of significant leverage is acquiring these additional site-specific licenses, as it is permitted to acquire and use them while other potential buyers would not be able to integrate them into their ESMR systems.



Thus, under the Bureau's plan, Sprint is permitted to encumber the licenses of the non-Sprint 800 MHz licensees in Puerto Rico by requiring them to comply with co-channel interference requirements that do not apply to Sprint's own 800 MHz EA licenses in the same region.<sup>40</sup>

This disparity in encumbrance is more than a mere theoretical concern; it may prevent non-Sprint licensees from adopting advanced CDMA technologies.<sup>41</sup> Further, it runs counter to the Commission's command that "Sprint is to be assigned replacement spectrum on the same basis as other ESMR licenses."<sup>42</sup> It is also inconsistent with the Commission's recognition of the corresponding spectrum shortage in the SouthernLINC region. There, the Commission adopted an alternative band plan based on an agreement between SouthernLINC and Sprint.<sup>43</sup> To ameliorate this competitive imbalance, at a minimum, the Commission must direct the TA not to permit any Sprint site licenses in non-Sprint licensees' EA spectrum, or at least clarify that ESMR channels received by non-Sprint licensees or eligibles will not be encumbered in any manner by Sprint's 800 MHz site-specific licenses.

## **VI. THE PROPOSED REASSIGNMENT OF CHANNELS IN PUERTO RICO REPRESENTS AN INAPPROPRIATE WINDFALL TO SPRINT**

By subjecting Sprint to a reduction in channels before other 800 MHz licensees need to surrender any, the *Third Report and Order* implicitly acknowledges, as past Commission decisions have, that Sprint has received due consideration in the 800 MHz reconfiguration

---

<sup>40</sup> See 47 C.F.R. § 90.683(b).

<sup>41</sup> See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02-353, *Report and Order*, FCC 03-254 ¶ 44 (Nov. 25, 2003).

<sup>42</sup> *Second Memorandum Opinion and Order* ¶ 33.

<sup>43</sup> See *First Report and Order* ¶ 166.

process through the grant of its nationwide 1.9 GHz license.<sup>44</sup> But the *Third Report and Order* appears to hold the promise of a further, totally unencumbered award of channels to Sprint that will leave it with a significantly greater share of the ESMR band than it had before the rebanding. Specifically, it promises Sprint additional licenses if the PCSI “licenses are revoked or cancelled.”<sup>45</sup> Such a result would have three impermissible effects. First, it could incentivize Sprint to negotiate FRAs with PCSI in such a manner as to put PCSI in a disfavored operational position where it would be less likely to hold onto its licenses. Second, it circumvents the Commission’s licensing procedures and its obligations to resolve situations of mutual exclusivity. These obligations cannot properly be discharged by preselecting a successor before a license is cancelled.<sup>46</sup> Third, and perhaps most importantly, if the PCSI channels are reassigned to Sprint, it would lose only five channels, or three percent of its current channel assignment, while the ESMR band would shrink by 130 channels – more than 30 percent. There is no basis for Sprint to reap such a disproportionate benefit from the rebanding process. If the PCSI licenses are revoked, they should be treated as vacant channels, thus available for licensing by general application in the I/B Radio Pool as would be the case under the Commission’s normal licensing procedures and its obligations to resolve situations of mutual exclusivity.

## **VII. THE BUREAU MAY HAVE EXCEEDED ITS DELEGATED AUTHORITY**

Finally, the Bureau’s actions may have gone beyond the scope of the authority delegated to it by the Commission. The Commission empowered the Bureau “to approve or modify the

---

<sup>44</sup> See *Third Report and Order* ¶ 18. See also *Second Memorandum Opinion and Order* ¶¶ 28-30; *First Report and Order* ¶¶ 12, 33-35, 223-25.

<sup>45</sup> *Third Report and Order* ¶ 14.

<sup>46</sup> See 47 U.S.C. §§ 308, 309.

proposed band plan and timetable [from the TA], subject to the guidance provided below.”<sup>47</sup> It is unclear if this delegation encompasses the authority to promulgate rules, as the Bureau has done below. Moreover, for the reasons discussed above, it is doubtful that the Bureau’s decision is within the bounds of the Commission’s guidance to which delegation was explicitly subject.<sup>48</sup>

Nor does Section 0.191 of the Commission’s rules constitute a clear source of Bureau authority. The Bureau has authority to act under delegated authority pertaining to matters of “public safety, homeland security, national security, emergency management and preparedness, disaster management, and ancillary operations.”<sup>49</sup> While this general provision would not be sufficient standing alone to grant the Bureau the authority it has asserted in this proceeding, Section 0.191(f) of the Commission’s rules empowers the Bureau to “administer all authority previously delegated to the Wireless Telecommunications Bureau” in the matter of improving public safety communications in the 800 MHz band.<sup>50</sup> It is doubtful, however, that the *Wireless Bureau* had been delegated the requisite authority to complete a rulemaking on this specific matter involving a new 800 MHz band plan for Puerto Rico and the U.S. Virgin Islands. Section 0.191(f) only entitles the Public Safety Bureau to exercise authority that *had* belonged to its sister bureau, and did not create additional powers beyond the inherited ones.

---

<sup>47</sup> *Second Memorandum Opinion and Order* ¶ 33.

<sup>48</sup> Specifically, the Bureau seems to ignore the Commission’s edict that “the revised band plan must ensure that the non-ESMR band fully accommodates all non-ESMR licensees .... Sprint is to be assigned replacement spectrum on the same basis as other ESMR licensees....If there is insufficient spectrum in the ESMR band to accommodate all ESMRs and ESMR-eligibles, Sprint must surrender spectrum on a *pro rata* basis to the other licensees to meet the shortfall. If insufficient spectrum remains after Sprint has surrendered spectrum, *pro rata* apportionment may be used to determine each licensee’s share of the ESMR band. All ESMR and ESMR-eligible licensees must participate in such apportionment.” *Second Memorandum Opinion and Order* ¶ 33.

<sup>49</sup> 47 C.F.R. § 0.191.

<sup>50</sup> 47 C.F.R. § 0.191(f).

These doubts are especially pertinent here because the *Third Report and Order* by far transcends the all-important public safety matters arising in connection with the 800 MHz band, extending to commercial concerns regarding spectrum usage by commercial entities and touching on some issues that have no implications for public safety whatsoever. It is, of course, the Commission, after appropriate consultation with both Bureaus, that should have acted here.

## **VIII. CONCLUSION**

When the Commission singled out Puerto Rico for different treatment from the rest of the nation, it presumably did not intend for the Bureau merely to reapply, without significant adjustment, the national rebanding plan with a small 0.5 MHz adjustment to the guard band. In trying to force Puerto Rico into the national mold, the Bureau places ESMR licensees and eligibles in a worse position than is necessary or appropriate, encumbered needlessly by Sprint's site licenses. Further, the *Third Report and Order* contemplates the possibility of supplying Sprint with spectrum for which it has neither applied nor paid. For these reasons, we respectfully request that the Commission reconsider the Bureau's *Third Report and Order*.

Respectfully submitted,

\_\_\_\_\_  
/s/

**Smartcomm, L.L.C.**  
3131 E. Camelback Rd.  
Suite 450  
Phoenix, AZ 85016

**Mr. Kenneth Fry**  
36 Jared Blvd.  
P.O. Box 5244  
Kendall Park, NJ 08824

**Preferred Spectrum Investments, LLC**  
3131 E. Camelback Road  
Phoenix, AZ 85016

July 22, 2010

Pantelis Michalopoulos  
Christopher R. Bjornson  
Andrew Guhr  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 429-3000  
*Counsel for Smartcomm L.L.C.*

# **Exhibit A**

## **800 MHz Band Plans**

MHz	806-809.7375	809.7625 - 815.9875	816-820.9875	821-823.9875		
700 MHz Public Safety Band	General Category 150 Channels	Interleaved Spectrum 80 SMR, 50 Business, 50 industrial, 70 Public Safety (250 channels)	ESMR Block 200 Channels	NPSPAC Public Safety 120 Chan	Cellular A & B	Channel Plan
MHz	806-808.9875	809-814.9875	815	816	817-823.9875	
700 MHz Public Safety Band	NPSPAC Public Safety 120 Chan	Public Safety, Hi Site SMR, Business, Industrial Channels 240	Expansion Band 40ch.	Guard Band 40ch.	Cellular Like ESMR Block 280 Channels	Cellular A & B
						FCC's Final Plan

MHz	806-808.9875	809-812.5	812.5-813.5	813.5 - 824
	NPSPAC Public Safety 120 Chan			ESMR 420 Channels

MHz	806-808.9875	809-814.9875	815-816.5	816.5-817	817 - 824
	NPSPAC Public Safety 120 Chan			Guard Band 20 Ch.	ESMR 280 Channels

MHz	806-808.9875	809-812.5	812.5-813.5	813.5 - 824
	NPSPAC Public Safety 120 Chan			ESMR 420 Channels